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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 1303

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

150.29 ACRES OF LAND, MORE OR LESS, IN MILWAUKEE COUNTY, WISCONSIN, and VLASTA KRIZ, et al.,
Defendants.

ELINE'S INC.,
Petitioner and Appellant Below

vs.

LAKESIDE LABORATORIES, INC.,
Respondent and Appellee Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Page

1. This is companion case to case of *Eline's, Inc. (Petitioner and Appellant below) vs. Gaylord Container Corp. (Respondent and Appellee below)*, case No. 1302, also before this court on Petition for Certiorari, was tried before same trial judge, by same counsel, and involved same issues of law and fact as in Gaylord case. Decision of Seventh Circuit Court of Appeals herein adopted that court's opinion in Gaylord case 1

2. In this (Lakeside) case trial court applied correct rules of valuation in determining just compensation for leasehold interest and properly instructed the jury (R. 407-8); as to business profits not being a proper basis of valuation (R. 411-12); as to cost of installations and improvements (R. 407); and as to Lakeside's construction of additional building on leasehold premises (R. 411)..... 2-3

3. Seventh Circuit Court of Appeals held here as in Gaylord case that trial court adopted correct measure of damages. In view of considered and elaborate instructions on the proper application of evidence, jury could not have been misled and instructions could not have left any misunderstanding with jury as to proper application of evidence..... 4

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This is a companion case to the case of *Eline's Inc. (Petitioner and Appellant below) vs. Gaylord Container Corp. (Respondent and Appellee Below)*, Case No. 1302. It was tried before the same court, by the same counsel, and involved the same issues of law and fact as the Gaylord case. The decision of the Seventh Circuit Court of Appeals in this case merely adopted that court's opinion in the Gaylord case (R. 497).

The Petition for Writ of Certiorari in this case follows the same pattern as the Petition in the Gaylord case, No. 1302. No useful purpose would be served by

duplicating the respondent's brief. By way of emphasizing what was said in our brief in the Gaylord case, to the effect that the trial court had applied the correct rules of valuation in determining just compensation for a leasehold interest, we wish to point to certain portions of the trial court's instructions to the jury in this case:

(a) *On expense of moving, loss of profits, etc.,* the court said (R. 407-8):

> "You are not permitted, and I want to get this clear in your mind, and I think counsel, in part, have emphasized the same thing—you are not to make any allowance for damages to the personal property of the tenant or for the expense of removing the same, nor for any loss of profits, nor for expenditures to secure a new location, nor any higher rent that might have to be paid elsewhere. You are not to make any allowance for expenditures to prevent a loss of trade, nor for the inconvenience or interruption of business suffered by the necessity of moving. Neither is the loss of good will a proper element of damages, nor are losses in the business because of the necessity of giving up conveniences that the tenant may have enjoyed on the premises which are condemned. None of these are recoverable."

(b) On *Business profits* as a basis of valuation, the court said (R. 411-12):

> "A number of witnesses have testified as to their opinion of the fair market value of the leasehold. * * * If you find that any expert in valuing the leasehold based his opinion upon the production of the business or avoidance of losses or inconvenience, you may disregard such testimony as being of any evidence as to the value of the lessee's interest. This is due to the fact that income from a business conducted on a property is not evidence of the value of the leasehold because there are so many things

that enter into income or profits, and they are too speculative and uncertain."

(c) On *cost of installations and improvements,* the court said (R. 407):

"The rule may be stated: The value of improvements made by the lessee which are to become the property of the lessor at the end of the term and installation costs which would be of little or no value to the lessor should be included to the extent only to which they enhance the market value of the leasehold for the balance of the term.

"Now, many references were made by counsel to Exhibit 26. You will recall that I stated during the trial that I received Exhibit 26 into evidence with some reluctance because I feared that it might be confusing to the jury. I instructed you that the exhibit should be received with great caution. I told you that the items of cost were not in themselves elements for which you can make allowance. These items are not to be considered by you except in so far as they increase or enhance the rental value for the balance of the term. I emphasize the rental value."

The court continued with respect to Lakeside's construction of the annex building (R. 411):

"Lakeside is not entitled in this proceeding to receive compensation for the cost or the replacement value or the unamortized value of that building, because, according to the terms of the lease, it had to leave same on the premises when the term ended by lapse of time or otherwise. That is, you do not consider it except that you can consider it to the addition that the building increased the fair rental value for the balance of the term over and above the amount of the rent that was required to be paid."

In the light of these instructions which aptly describe the rules by which the trial court was guided in admitting evidence of value, we submit the Circuit Court of Appeals was amply justified in concluding (R. 497):

> "We also held in that case, as we hold here, that the trial court adopted the correct measure of damages and that in view of the Court's considered and elaborate instructions to the Jury on the proper application of the evidence that the jury could not have been misled. The Court's instructions to the jury in the instant case were in all respects similar to those given in the Gaylord case, and in view of their clarity could not have left any misunderstanding with the jury as to the proper application of the evidence."

The Petition for Writ of Certiorari should be denied.

Dated: June 11, 1945.

Respectfully submitted,

MALCOLM K. WHYTE,
GERALD P. HAYES,
VICTOR M. HARDING, JR.
Attorneys for Lakeside Laboratories, Inc., Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1302

ELINE'S INC., PETITIONER

v.

GAYLORD CONTAINER CORPORATION

No. 1303

ELINE'S INC., PETITIONER

v.

LAKESIDE LABORATORIES, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

These two cases arise out of condemnation proceedings instituted by the United States to acquire the fee simple title to certain lands in Milwaukee, Wisconsin. Approximately 91 acres of the land taken was owned by petitioner Eline's,

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Inc., and was improved by industrial buildings. Portions of the property were occupied by Lakeside Laboratories, Inc., and Gaylord Container Corporation under leases from Eline's, Inc. The United States agreed with Eline's as to the amount of compensation to be paid for the entire property and paid the agreed sum, $2,290,000, into court. This payment discharged the obligation of the United States, and the United States has no pecuniary interest in proceedings for distribution of the fund between the various claimants.[1]

Nevertheless, although the United States did not participate in either the trials or the appeals of these proceedings between claimants to the fund, the United States is directly interested in the validity of certain of the propositions of law deemed by the lower courts to be controlling, and presented for the consideration of this Court in the petitions for writs of certiorari. The controversy in each case is between the fee owner of the land and a tenant, as to the proper measure by which to determine the amount to which the tenant was entitled out of the sum paid by the United States for the fee. The court below rejected contentions of the fee owner that this

[1] *United States* v. *Dunnington*, 146 U. S. 338, 351; *Eline's, Inc.* v. *Town of Milwaukee, Wis., et al.*, 135 F. 2d 878 (C. C. A. 7). Indeed, the United States was not even entitled to notice of such proceedings. *United States* v. *Certain Lands in Town of Hempstead, Nassau County, New York*, 129 F. 2d 918 (C. C. A. 2).

amount was controlled by certain lease provisions;[2] and it plainly regarded the cases as governed by the same criteria as would have been applicable if the controversy had been between the tenant and the United States. This appears from the court's express reliance in its opinions on the decision of this Court in *United States* v. *General Motors Corporation,* 323 U. S. 373—a decision which, of course, dealt directly and exclusively with the liability of the United States upon condemnation of a leasehold.[3] Accordingly, there is likelihood that the rulings below will be urged as precedents to the disadvantage of the United States in future litigation to which it may be a party.

In the *General Motors* case, this Court said (323 U. S. at 379):

[2] The petitions for writs of certiorari seek to present the questions whether a lease provision for termination of the lease upon condemnation "by any company or corporation lawfully qualified to exercise the right of eminent domain" was effective upon condemnation by the United States, and, if not, whether the condemnation brought into play a separate provision for liquidated damages upon sale of the property. The United States does not desire to take any position on these questions, at least at this stage of the litigation, and this memorandum is not concerned therewith.

[3] That the trial court followed the same view appears from the fact that the judge, in ruling on the admissibility of evidence and in instructions to the jury, repeatedly pointed out that the United States had not taken either the machinery or the business, and that the value of the leasehold alone was therefore at issue (No. 1302: R. 87, 163, 205, 492, 529; No. 1303: R. 55, 174, 375, 408).

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. * * * We are not to be taken as departing from the rule they have laid down, which we think sound.

In the instant cases, the United States took the fee. Nevertheless, the circuit court of appeals sustained the method of valuation employed at the trial, saying:

> The instant case is not completely parallel with the *General Motors* case, and not all that is said in that opinion is applicable to the facts here, but in so far as applicable we think the principles there enunciated were properly applied.

We construe the *General Motors* decision as being inapplicable where, as here, the United States condemns a fee title, as well as where the United States condemns for a period of time longer than the term of existing leases. We deem it important that the limitations of the *General Motors* decision be made clear to the lower courts, in order that the doctrine of that case be not misapplied to the detriment of the Government. To this end the

United States has filed a petition for writs of certiorari (Oct. Term 1944, Nos. 1272–1278) to review the decision of the Circuit Court of Appeals for the Tenth Circuit in *United States* v. *Petty Motor Company*, et al., 147 F. 2d 912, where, it is believed, the *General Motors* decision was misapplied to sustain the admission of evidence of removal costs and consequential damages in the valuation of the rights of tenants whose terms were of shorter duration than that taken by the Government. The instant cases, it is believed, involve a comparable misapplication of the doctrine of the *General Motors* case, and present equally cogent grounds for the issuance of the writs of certiorari prayed by the petitioner. If the writs are granted, the United States proposes to participate in the cases on certiorari because of the importance of determining the correct application of the *General Motors* decision.

Respectfully submitted.

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JUNE 1945.

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